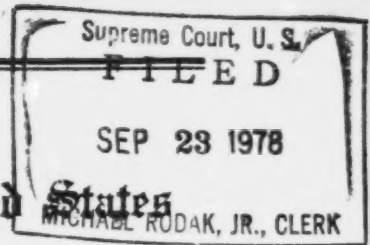


**In the
Supreme Court of the United States**



OCTOBER TERM, 1978

NO. 78-498

ROBERT MEYER BOULET,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

Robert Meyer Boulet, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on August 8, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, as reported in 577 F.2d 1165 (5th Cir. 1978), is appended hereto, *infra* at p.A-1. It affirmed a judgment of conviction of petitioner for willful evasion of income taxes, in violation of 26 U.S.C. § 7201. The unreported minute entry of the District Court, which denied petitioner's Motion For Judgment of Acquittal, is appended hereto, *infra* at p.A-24.

JURISDICTION

The judgment of the United States Court of Appeals was

entered on August 8, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED FOR REVIEW

Whether in a tax evasion prosecution wholly based upon an indirect, circumstantial reconstruction of defendant's income, known as the Bank Deposits method of proof, wherein the Government was required to establish with reasonable certainty the defendant's cash on hand at the outset of the prosecution years, and to demonstrate a guarantee of essential accuracy in the underlying circumstantial evidence offered at trial, it was error for the district judge to submit the case to the jury following concessions from the witness stand by the case agents for the Internal Revenue Service to the effect:

- 1) that the Government could not determine opening cash on hand with any degree of accuracy;
- 2) that the Government had an anomalous theory that petitioner had a "negative" cash on hand as of January 1, 1969-- even though it is impossible to have a "negative" cash on hand, and even though defendant bought a \$15,000 cashier's check on January 2, 1969, with cash; and
- 3) that said agents had not sought to purify non-income items from the total of defendant's gross bank deposits by inspecting, even on a random basis, the items petitioner had deposited into his various bank accounts.

STATUTES INVOLVED

United States Code, Title 26, Section 7201

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure, Rule 29(c)

(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT OF THE CASE

A. Proceedings Below

On April 13, 1976, a four-count indictment was filed

against Dr. Robert Meyer Boulet of LaRose, Louisiana in the Eastern District of Louisiana. The indictment alleged petitioner's willful evasion of income taxes for the years 1969, 1970, 1971, 1972, in violation of 26 U.S.C. § 7201. On September 13, 1976, Dr. Boulet's trial commenced in New Orleans, Louisiana before the Honorable Frederick J.R. Heebe and a jury. After six days of trial, on September 20, 1976, the jury returned a verdict of guilty as charged on all four counts. Thereafter, on October 20, 1976, petitioner moved for a judgment of acquittal pursuant to Rule 29 (c) of the Federal Rules Of Criminal Procedure, on the basis that the Government had failed to prove with reasonable certainty the amount of cash on hand in petitioner's possession as of January 1, 1969, the first day of the indictment period. Following a hearing, the trial court denied petitioner's motion through a minute entry dated November 18, 1976. On December 2, 1976 Dr. Boulet was sentenced to a prison term of one year, execution of all but ninety days of which was suspended. In addition, petitioner was placed on two years inactive probation to commence on his release from custody. As a condition of probation, Dr. Boulet was to make restitution in the amount of approximately \$60,000 -- the ostensible tax deficiency.

On August 8, 1978, the United States Court of Appeals for the Fifth Circuit affirmed Dr. Boulet's conviction.

B. The Government's Theory of Proving an Underreporting of Income In Each of the Four Years in Question

To prove unreported income, the Government relied upon one of two wholly circumstantial methods of proving such an occurrence, namely, the Bank Deposits plus Cash Expenditures method. Under this method, all deposits to the tax-

payer's bank accounts are added together to determine Gross Bank Deposits. The total is then ostensibly purified by the deduction of non-taxable items deposited in the accounts such as gifts, transfers of money between accounts, and, most importantly, cash on hand from a pre-indictment year. To the resulting net Taxable Bank Deposits figure is added provable Cash Expenditures, the total of which equals Gross Income. This figure is then reduced by applicable deductions and exemptions, leaving Corrected Taxable Income, which is then compared to Taxable Income Reported by the taxpayer to determine Unreported Taxable Income (273-93).*

The efficacy of this circumstantial method of proving unreported income depends almost entirely upon the Government's ability to properly purify the Gross Bank Deposits figure. (316-318). In the case at bar, there was virtually no dispute as to the figures comprising Gross Bank Deposits or Cash Expenditures. Rather, the battle was fought over the Government's right to ask a jury to conclude that Dr. Boulet had underreported his taxable income in 1969, 1970, 1971, and 1972 in the absence of adequate proof that it had eliminated non-taxable income items from the Gross Bank Deposits analysis, particularly cash on hand from a prior period. (316-318).

The thrust of petitioner's effort was that the circumstantially arrived at conclusion of underreporting of taxable income was legally impermissible, because of the Government's primary failure to properly credit Dr. Boulet with cash on

* Parenthetical references refer to the appropriate pages in the Joint Appendix which was originally filed with the Fifth Circuit. A copy of said appendix has been filed along with the instant petition. References with the notation "GX" or "D X" connote Government or Defense Exhibits, respectively.

hand at the outset of the prosecution period (1/1/69) in an amount which virtually wiped out the alleged underreporting in any one or all of the four prosecution years. The Government's own investigative effort to determine cash on hand as of January 1, 1969, as described at the trial, pointed to the existence of such a cash hoard, but stopped short of ascertaining its source. The defense took upon itself the burden of establishing, through the Government's own witnesses, that this cash accumulation was the result of Dr. Boulet's underreporting income in years *prior* to the four indictment years, and that such additional income, on hand at January 1, 1969 but *not taken into account* in the Government's circumstantial analysis, fatally flawed its case (296-481, 483-556).

C. Statement of Facts

1. The Trial Testimony

The Government's case was bottomed upon the investigation and resulting analysis done by Special Agent Edmond J. Martin, and the conclusions derived therefrom by the Government's summary witness, Revenue Agent Joseph Rotolo.

Agent Martin testified at length about the nature of his investigation and through him the Government introduced GX-73 (141) and supporting schedules (GX 74-79, 842-47, 271-95) which summarized the indirect method of proof utilized, and from which the jury was asked to conclude that Dr. Boulet had underreported his taxable income in each of the four years in question. With respect to the Gross Bank Deposits, Agent Martin testified that no attempt was made to

analyze the checks comprising the deposits to Dr. Boulet's business accounts, despite the fact that every check was on microfilm at the bank's storage facility (318-23). With respect to the deposits to the doctor's savings account between 1969-1972, Agent Martin testified that these constituted deposits of cash and conceded that if the source of these deposits was cash on hand prior to January 1, 1969, this fact would destroy the thesis of his indirect method of proving unreported income, inasmuch as the amount deposited to the Hibernia accounts during the four years was in excess of that which he determined went unreported during the same period (334-36).

In order to ascertain with reasonable certainty Dr. Boulet's cash on hand at the outset of the prosecution period -- a requirement which the Agent conceded was mandated when utilizing a Bank Deposits method of proof in which a substantial portion of the deposits are in the form of cash -- the Agent had prepared a Source And Application Of Funds analysis for the period 1962-1968. (GX 59-A at 834-840) By totaling all sources of funds available to be expended in a given year and then subtracting all expenditures in that year, one can determine cash on hand at the end of each year. By carrying this figure over to the following year as an additional source, and repeating the process for each year, one can determine the cash on hand at the end of a given period of years, in this case, as of December 31, 1968 (246-71, 463). Agent Martin's startling and anomalous conclusion, as reflected on GX59-A, was that Dr. Boulet had a *negative* cash on hand at the outset of the prosecution period in the amount of \$14,982.94. Martin completely ignored the implication of this conclusion i.e. that a person cannot have a negative cash on hand because he cannot expend more cash than he

has, and that by necessity, Dr. Boulet had a source of income during the pre-indictment period which Martin had failed to take into account (267). Instead of dealing with the obvious defect in his Source And Application Of Funds analysis, for the purpose of trial Martin simply gave Dr. Boulet credit for having \$15,000 cash on hand on January 1, 1969, because the doctor had purchased a cashier's check on January 2, 1969 and, realistically, this money could not have been earned during one day in 1969 (277-79, 346-54).

On cross-examination, Martin conceded that several factors pointed to the inaccuracy of his Source And Application of Funds analysis and hence to his erroneous determination of virtually no cash on hand. First, Dr. Boulet was an individual who always kept a substantial amount of cash on hand, and this was wholly inconsistent with the Government's thesis that he had completely depleted his cash hoard when he bought the \$15,000 cashier's check on January 2, 1969 (347-49). Second, the negative cash on hand figure as of December 31, 1968 pointed to an additional source of income. Since the prime income source relied upon by Martin for the 1962-1968 period analysis was *reported* taxable income, the negative cash on hand figure suggested that an additional source of income was *unreported* income during the pre-indictment period (353-55, 379).

Martin conceded that the one way to determine whether or not Dr. Boulet had such an additional source of income was to do a Net Worth analysis for the period 1962-1968, the necessary data for which was in evidence or otherwise known to Martin. On a blank standard net worth form supplied to him by defense counsel, Martin was asked to calculate the increase in Dr. Boulet's net worth between 1962 and 1968.

This was done by Martin, and the document was introduced as DX-5 (855). It reflected, based on Martin's own calculations, that during the period 1962-1968 Dr. Boulet had Taxable Income of \$345,144.32 and had reported Taxable Income in those years of only \$199,821.04. The difference, \$145,323.28, represented Unreported Taxable Income during the pre-indictment period (355-78, 462-63).*

Martin then conceded that this definitively established additional source of income should have been included in the Source portion of his Source And Application Of Funds analysis (GX59-A), and that this necessary addition changed the negative \$14,982.94 cash on hand figure to a positive cash on hand figure as of 12/31/68 of substantially in excess of \$100,000. This sum of money would have been available as a source for the cash deposited in the Hibernia Homestead during the four years at issue (379-80, 390-91, 406-07, 416-19, 463-70).

The final witness called by the Government was its summary expert witness, Revenue Agent Joseph Rotolo. This expert, who sat through the entire trial, explained the absolute necessity for establishing cash on hand with reasonable certainty, the propriety of using the net worth method to determine unreported income, and the need for including this additional source on the Government's Source And Application Of Funds analysis, GX-59-A. (515-20).

* For purposes of the net worth analysis only, defense counsel had Martin use the figure \$15,000 as cash on hand as of 12/31/68 (DX5, line 1), since this was the amount that the Government had credited Dr. Boulet with having on hand. In fact, the size of this actual figure was unknown, but logically some minimum figure had to be used to complete the net worth calculation.

Rotolo admitted that Special Agent Martin should have known that the negative cash on hand figure derived on his Source And Application Of Funds analysis indicated the presence of pre-indictment period unreported income (547-48). Moreover, he conceded that *it was impossible to determine with reasonable certainty the amount of cash on hand of January 1, 1969:*

Q.[L]et me ask this question: Is it imperative in a theory that is being used, either bank deposits theory, which is, both, the theory used in the revision and on the chart, is it imperative that you determine with reasonable certainty what the cash on hand really was at the beginning of the period?

A.Yes.

Q.Why is that?

A.Because if you don't, then you have to have a cash starting point to account for any cash that might be coming in as earned in the prior period.

Q.So that every cash deposit that was made during the period could, if you don't account for it, it may be cash on hand from a prior period, is that right?

A.That is right. (514-15).

Q.Right now, is it fair to say, as you sit there, you cannot determine with any degree of accuracy, right there as you sit on the witness stand, you cannot determine with any

degree of accuracy, how much cash on hand Dr. Boulet went into 1969 with?

A.I cannot do it, no.

You are asking me, no, I cannot, but we both know there is additional expenditures that should be on this thing.

Q.I agree, but the question is, what is left?

A.I don't know, I don't have the information here right now.
(529)

Q.So we have no way, as a result, because we haven't gotten an accurate source and application -- or we haven't gotten an accurate application, I should say, to determine the cash on hand, is that correct? And that is where we sit?

A.Right (531).

Following Agent Rotolo's testimony, which closed the Government's case, the defendant moved for a judgment of acquittal which the Court took under advisement over the intervening weekend. The motion was subsequently denied and the case was then submitted to the jury. Following several hours of deliberation, a verdict of guilty was rendered on all counts.

Defendant's written motion for Judgment of Acquittal, filed after the verdict of guilty was returned, addressed itself, in the main, to the failure of the Government to tie down opening cash on hand with any reasonable certainty

(561-68). In denying the motion, the trial court blithely described the concession of the Government's expert witness that cash on hand could not be determined with reasonable certainty as "an erroneous accession" which could be disregarded by the jury in determining whether the Government had adequately established cash on hand at the outset of the prosecution period. (See pages A 24-33, *infra*.)

2. *The Opinion of the Court of Appeals*

In a lengthy opinion which cites virtually every leading case relating to the bank deposits method of proof, the Fifth Circuit affirmed petitioner's opinion. While the Court of Appeals took pains to demonstrate that its decision drew its sustenance from numerous Court of Appeals cases in this field, it should be noted that the opinion fails to deal with the crucial issues raised by petitioner below. Not one word in the opinion is addressed to Agent Rotolo's damning concession that the Government could not tie down opening cash on hand with any degree of accuracy. Moreover, while the Court of Appeals mentioned the anomalous "negative" opening cash on hand figure, the Court then side-stepped the issue entirely. Rather than measuring the effect of the Government's startling, negative opening cash on hand figure against the prevailing "reasonable certainty" standard, the Court merely posited that if defendant truly had a cash hoard, he wouldn't have denuded one of his interest-bearing accounts. Finally, it should also be noted that the opinion erodes what little protection the Courts of Appeals have afforded defendants in bank deposit cases when it concludes that the agents carried out the requisite "purification" of non-income items from gross bank deposits -- even though the Government failed to examine any of the checks deposit-

ed in petitioner's accounts. Had such an examination of the readily available bank microfilms been made, as was required by the leading case of *United States v. Slutsky*, 487 F.2d 832 (1974), *cert. denied*, 416 U.S. 937 (1974), numerous non-income items would have been found since the doctor's patients often paid their fee with social security checks, payroll checks and welfare checks for which they were given change from cash supplied by Dr. Boulet. In general, the opinion attempts to set forth a logical analysis pointing to guilt, rather than weighing the glaring deficiencies in the Government's case which the case agents themselves conceded from the witness stand.

REASONS FOR GRANTING THE WRIT

By holding, in a tax evasion case based entirely on the circumstantial Bank Deposits method of income reconstruction, that the prosecution established the amount of cash on hand at the start of the indictment period with reasonable certainty and performed the duties incumbent on it in attempting to separate taxable income from other sources in petitioner's gross bank deposits, the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been reviewed by this Court. Because of the large number of tax evasion prosecutions, and the growing percentage of criminal tax cases which are utilizing the wholly circumstantial and heretofore unreviewed Bank Deposits method of proof, this case presents an issue ripe for determination by this nation's highest court.

According to the latest figures made available by the United States Department of Justice, there were 130 different classes of criminal offenses which the Government prosecut-

ed during 1976 - the year petitioner was brought to trial. During that year, prosecutions for income tax violations ranked as the *eleventh* most frequent type of criminal case. 1976 Annual Report of The Attorney General of the United States, pp. 20-21*. Despite the large number of said prosecutions, it has been noted by a leading commentator that,

"Trends in tax prosecution have for at least two decades been continuously running against the main currents in criminal procedure. By subtle doctrinal manipulation, the courts confer more and more discretion on invoking officials and reduce the roles of judge and jury. The judge's role is limited by his abdication of responsibility to define the offense and to determine the sufficiency of evidence. The jury's function is restricted by a procedural panoply which prevents a full and fair test of the Government's proofs." Duke, *Prosecutions For Attempts To Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 Yale L.J. 1,2-3 (1966).

Given the added power which has devolved upon the "invoking officials", it is no surprise that "convictions were

*The Government states that,

"In fiscal year 1976, prosecutions in the criminal tax enforcement operations of the Tax Division included taxpayers from the full spectrum of occupational activities and social positions. Non-racketeer convictions included doctors, lawyers, accountants, school teachers, municipal officers, farmers, pornography dealers, airline pilots, corporate executives, and numerous so-called "tax protestors." 1976 Annual Report of the Attorney General of the United States, p. 137.

obtained in 94% of all criminal tax cases prosecuted" during 1976. 1976 Annual Report of The Attorney General of the United States, p. 137.

Concomitant with the large number of tax evasion prosecutions and ensuing convictions, is an increased utilization of the wholly circumstantial method of proof under scrutiny in the instant case, known as the Bank Deposits method of income reconstruction. Indeed, during the latest period for which such statistics are kept, the Bank Deposits method of indirect proof was utilized more frequently than the net worth method of demonstrating underreported income. Intelligence Digest, Internal Revenue Service, April-May-June, 1977, p. 101.* Despite the increased popularity of the Bank Deposits method of proof, this Court has never passed upon the validity of this entirely circumstantial means of obtaining large numbers of convictions.**

The central problems created by the wholesale use of circumstantial evidence in the Bank Deposits method of proving tax evasion were aptly summed up by a former trial attorney with the Tax Division of the Department of Justice.

* The Intelligence Digest was obtained by counsel through the Freedom of Information Act. The cover letter from the Freedom of Information Branch of the Internal Revenue Service, dated July 27, 1978, stated that the April-May-June 1977 Intelligence Digest was the most current issue available.

** It has been virtually twenty-five years since this Court set down groundrules for the utilization of the *net worth* method of proof in *Holland v. United States*, 348 U.S. 121 (1954).

"The circumstantial methods of reconstructing income require assumptions, among which is the equation of unexplained funds in the taxpayer's possession with unreported taxable income. Obviously, such an assumption has many weaknesses.**** There is great danger that the jury may assume that once the Government has established the figures in its computations, the crime of tax evasion automatically follows.**** Bare figures have a way of acquiring an existence of their own, independent of the evidence which gave use to them" Schmidt, *Reconstruction of Income*, 18 Tax Law Rev. 23,32 (1962).

As occurred in the prosecution of Robert Meyer Boulet, which featured a concession from the Government's summary witness that there was no accurate proof of opening cash on hand, and a ludicrous assertion by the Internal Revenue Service Special Agent that the defendant had done the impossible-- spent more cash on hand than he had-- "there is the danger in any given case that the reconstruction is but an accounting sham, giving a semblance of system and logic to a reconstruction based upon an erroneous assumption." *Id.* at 97.

Although the concern of the commentators has not yet caused this Court to review the Bank Deposits method of proof, a growing number of district judges and Circuit Courts have sought to impose reasonable guidelines on a method of proof which to date has been permitted to breathe willfulness into mere digits. One of the earliest cases to thoroughly deal with the problem still contains one of the most concise descriptions of why proof adduced in a Bank

Deposits case is so suspect. In granting a motion for judgment of acquittal at the close of the Government's case in a tax evasion prosecution predicated upon the Bank Deposits method, the trial judge stated,

"To be personal for a moment, I have served at various times in the capacity of the United States Attorney and later of Judge. In the last few years I have observed with interest a change that has taken place in the nature of proof offered to support the charge of the prosecution in many of these cases charging tax fraud. This change has caused me some concern by what appears to be a preference to introduce proof to show understatement of income and fraudulent intent by methods other than by direct evidence.

* * * *

" 'In this attempt, [to prove guilt circumstantially], unless the greatest care is taken by the district judge to prevent it, there is danger of the case being tried on a theory which, keeping to the ear the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing a series of theoretical estimates and computations as to defendant's income to take the place of proof of it.

* * * *

" 'This kind of latitudinous allowance of the admission and use of conclusions as evidence and the

submission of the case to the jury without a scrupulous adherence to the theory, has resulted in a tendency to accept, if not in the complete acceptance of, the idea that in a case tried by this method, ordinary rules of proof may be relaxed if not disregarded.' ". *United States v. Riganto*, 121 F.Supp. 158, 159 (E.D. Va., 1954), quoting *Demetree v. United States*, 207 F.2d 892 (5th Cir. 1953).

It is readily apparent that the same inherent defects which gave rise to the comments voiced above, surfaced as well in petitioner's trial. Because of these well known flaws, various Courts of Appeals, including the panel in the instant case, concede that the Government must, as part of its duties in negating the possibility that bank deposits in the years under investigation originated from nontaxable sources, establish in some credible fashion and to a reasonable certainty the amount of cash which the taxpayer had on hand at the start of the indictment period. *United States v. Slutsky*, 487 F.2d 832 (2nd Cir. 1973), *cert. denied*, 416 U.S. 937 (1974), *United States v. Penosi*, 452 F.2d 217 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972); *United States v. Frank*, 245 F.2d 284 (3rd Cir. 1957), *cert. denied*, 355 U.S. 819 (1957). The facts set forth below amply demonstrate that the Government's "proof" of opening cash on hand was anything but credible or reasonably certain.

Throughout the trial, and most particularly during the testimony of Special Agent Edmond J. Martin, the Government admitted that in order to meet its burden of tying down cash on hand with reasonable certainty as of December 31, 1968, it relied exclusively on an accounting schedule known as the

"Source And Application of Funds" (GX59-A, 334). Such an analysis cumulates the various "Sources" of a taxpayer's funds during a given period and juxtaposes this against the various uses of such funds, i.e., the "Application" of such funds. The excess of source of funds over application of funds, if any, represents cash on hand at the end of the period. (250) According to the Government's Source And Application of Funds analysis introduced in evidence, the defendant had expended (applied) more money than he had available to him between 1962 and 1968, therefore leaving him with a "negative" cash on hand of \$14,982.94 at the beginning of 1969.* (840)

Special Agent Martin and the Government's summary expert witness, Revenue Agent Joseph Rotolo, both testified that the accuracy of the cash on hand figure derived from the Source And Application of Funds analysis (GX-59-A) was dependent upon the completeness of the listing of appellant's sources of income. In the same vein, both witnesses testified that unless all applications of such funds were taken

* Although the Source And Application of Funds analysis concluded that defendant had no cash on hand as of January 1, 1969, the Government credited Dr. Boulet with \$15,000 cash on hand for purposes of its "Bank Deposit Summary Sheet", (see GX-73,841, GX-76 (844)). The Government's explanation for this was that since Dr. Boulet had purchased a \$15,000 cashier's check on January 2, 1969, with cash, this money could not logically have been earned in one day, but had to have been on hand from the prior period. The Government chose to ignore the inherent inconsistency between the negative cash on hand figure on its Source And Application of Funds analysis and the \$15,000 cash on hand reflected on its Bank Deposit Summary (GX-76). Had the Government taken cognizance of this patent inconsistency, it would have been apparent that it had omitted some source of additional funds from its Source And Application of Funds analysis, thus distorting its conclusion as to cash on hand. Moreover, if defendant had a "negative" cash on hand on December 31, 1968, but purchased, with cash, a cashier's check in the amount of \$15,000 on January 2, 1969, how could it be said that the government's proof opening cash on hand was "reasonably certain."

into account in the Source And Application of Funds analysis, the resultant cash on hand figure would similarly be distorted (520-21). Both witnesses readily conceded that if the appellant had a source of income in addition to those listed in Government Exhibit 59-A, such additional source would have to be credited to the "Source" portion of the schedule and that unless it could be determined how the funds from this additional source were "applied", cash on hand at the end of the period could not be ascertained with any degree of accuracy (416-17, 529, 531).

It was Dr. Boulet's consistent contention throughout the trial that Special Agent Martin's Source And Application of Funds analysis suffered from the very deficiencies which he and Agent Rotolo testified would result if an incomplete investigation were conducted into defendant's sources and/or his application of such funds. On its Source And Application of Funds analysis, the Government credited Dr. Boulet with only one major source of available funds from 1962-1968, to wit, the amount of income reported on his federal tax returns for those years. However, as petitioner clearly established, there was an additional significant source of funds during this pre-indictment period -- *unreported income* -- and this additional source was ignored by the Government in its effort to negate cash on hand by means of the Source And Application of Funds analysis.*

* Dr. Boulet's defense was obviously premised upon his conceding that he had underreported his income in years prior to 1969. If this subjects him to criminal or civil tax liability for the pre-indictment period so be it. But such concession should not in any way lessen the Government's burden of proving that in 1969, 1970, 1971 and 1972, Dr. Boulet actually earned more taxable income in *each of those years* than he reported.

In order to establish that Dr. Boulet did indeed have an additional source of income in the pre-indictment years, defense counsel had Special Agent Martin calculate appellant's true income between 1962 and 1968 through the Net Worth plus Expenditures method of income reconstruction (356-81, DX-5 at 855). This method of proof is the most widely accepted method of establishing that a taxpayer has taxable income over and above that reported on his tax returns. *Holland v. United States*, 348 U.S. 121 (1954). Both Agents Martin and Rotolo conceded that figures used to construct the net worth schedule were based on the Government's exhibits in evidence and that the ultimate conclusion, that *Dr. Boulet had an underreporting of approximately \$145,000 from 1962 through 1968, was accurate* (383, 390, 519).

Having conclusively determined that Dr. Boulet had an additional source of funds available totaling approximately \$145,000 between 1962 and 1968, both agents agreed that this amount had to be credited to the "Source" portion of its Source And Application of Funds analysis. The inclusion of this additional source of income meant that instead of there being a "negative" cash on hand at the beginning of 1959, there was in excess of \$100,000 on hand, *unless* it could be established that these additional funds had been expended prior to 1969. Although Special Agent Martin had categorically testified earlier that his Source And Application of Funds analysis had taken into account all of Dr. Boulet's expenditures during the pre-indictment period (267), when confronted with the additional source of funds, he baldly stated that this money must have been expended (406). But neither he nor Agent Rotolo could demonstrate how or what portion of it had been used (414, 529, 531).

In testimony which completely eroded the entire foundation of the Government's proof of cash on hand, the Government's accounting expert, Revenue Agent Rotolo, testified as follows:

"Q. Right now, is it fair to say, as you sit there, you cannot determine with any degree of accuracy, right there as you sit on this witness stand, you cannot determine with any degree of accuracy how much cash on hand Dr. Boulet went into 1969 with?

"A. I cannot do it, no. You are asking me, no, I cannot, but we both know there is additional expenditures that should be on this thing.

"Q. I agree, but the question is, what is left?

"A. I don't know. I don't have the information here right now." (529)

* * * *

"Q. So we have no way, as the result, because we haven't gotten an accurate source and application -- or we haven't gotten an accurate application; I should say, to determine the cash on hand, is that correct? And that is where we sit?

"A. Right." (531).

On this state of the record, the case was submitted to the jury.

The failure of the Government's proof on opening cash on hand was twofold. Not only was the premise that GX 59-A

included all known sources of available funds in the pre-indictment years shown to be false by its preparer, Special Agent Martin, when he was forced to reconstruct defendant's true net worth between 1962 and 1968; but over and above this critical flaw, the Government's summary witness testified that he could not accurately determine how much of the hitherto undiscovered \$145,000 had indeed been expended by the taxpayer. If the Government's own accounting expert could not determine cash on hand with any degree of accuracy, how could it be said that there was sufficient evidence for a lay jury to determine this crucial element beyond a reasonable doubt?

The trial court's response to this argument in the minute entry annexed hereto, posited the chimerical contention that Agent Rotolo's testimony could be disregarded by the jury since the "necessary evidence" to determine cash on hand was somehow before it for consideration. (See pages A 24-33, *infra*.) To permit a trial judge to merely cast aside testimony from the Government's summary witness on the unsupported basis that it was mistaken, when that testimony thoroughly undermines the Government's proof of an essential element, makes a mockery of the Government's burden in a criminal tax case built wholly on circumstantial evidence. Perpetuating the error, the Court of Appeals failed even to mention Agent Rotolo's testimony.

While skipping over petitioner's contention regarding Agent Rotolo's testimony, the Court of Appeals sought at length to deflate petitioner's argument regarding the Government's irregular finding of "negative" cash on hand. The Court stated that Dr. Boulet would not have kept cash on hand outside of a bank, since during this period he was

constantly stripping his interest - bearing bank accounts of funds accumulated therein. 577 F.2d at 1170. Of course, this misses the point entirely. The issue is not whether it was illogical to assume that Dr. Boulet would save his cash hoard while spending funds which would otherwise bear interest, but rather *whether the Government established "with reasonable certainty" the amount of opening cash on hand.* While the "bottom line" of Agent Martin's purportedly accurate Source and Application of Funds analysis showed Dr. Boulet with a "negative cash on hand" as of December 31, 1968, Martin conceded that on January 2, 1969 the taxpayer expended \$15,000 in cash to purchase a cashier's check (278). Unfortunately for the Government, both circumstances cannot exist at once. Simply stated, proof of opening cash on hand could not have been "reasonably certain" if as alleged by the Government, Dr. Boulet had totally depleted his cash hoard, but also had at least \$15,000 in cash on hand.

Had the Government's slipshod inquiry into opening cash on hand been buttressed by a careful examination of the items deposited into petitioner's bank accounts, perhaps the Government could avail itself of the argument that at least its underlying investigation demonstrated a guarantee of essential accuracy in the circumstantial evidence adduced. But, as is undisputed, the Government never deigned to examine even one of the thousands of items deposited during this four year prosecution. Regarding the adequacy of the Government's investigation into a Bank Deposits case, it has been established that,

"In order to legitimately avail itself of this approach, the government must initially introduce

evidence to show (1) that, during the tax years in question, the taxpayer was engaged in an income producing business or calling; (2) that he made regular deposits of funds into bank accounts; and (3) *that an adequate and full investigation of those accounts was conducted in order to distinguish between income and non-income deposits."*

United States v. Morse, 491 F.2d 149 (1st Cir. 1974) (Emphasis Supplied)

It is from this investigation of *the bank accounts in question* that the "guarantee of essential accuracy in the circumstantial proof" arises. *United States v. Slutsky*, *supra* at 840.

Keeping these requirements in mind while examining the adequacy of the Government's investigation, there can be no doubt whatsoever that the prosecution failed to meet its burden. The Government could not have conducted "an adequate and full investigation of those accounts....in order to distinguish between income and non-income deposits", because the Revenue Agents never examined, on a systematic or even a random basis, the very checks which comprised Gross Bank Deposits according to the calculations.

Special Agent Martin testified that among the numerous people interrogated by him was Dr. Boulet's nurse, Mrs. Venecia Williams (194). Mrs. Williams testified that it was common practice in the office to cash patients' social security checks, welfare checks, and payroll checks (13-14). From the check would be deducted the amount owed to the doctor for services rendered, and the patient would be given the difference in cash. While some of the cash used to negotiate these checks came from daily receipts, Mrs. Williams testified that it was certainly not uncommon for there to be insufficient cash in the daily receipts to accommodate a patient (36-37). On these occasions, Dr. Boulet would accept the check to accommodate his patient, and give him change from his own

cash funds (36). The record does not establish how often Dr. Boulet dipped into his cash hoard to make change. On some occasions, when there were insufficient funds on hand, Mrs. Williams would direct the patient to the bank, which was right down the street, to cash a payroll check (37).

Although he contends that he made an exhaustive study of all the bank deposits*, Special Agent Martin made no effort whatsoever to cull payroll, social security or welfare checks from the business account deposits (320-33).

Q. If somebody gives, or if you give Dr. Boulet \$100, but you only had the \$100 check, your payroll check, of \$100--

MARTIN: Yes.

Q. -- and you give it to him in payment of a fee of \$10, and he gave you change of \$90, then he deposited the \$100 check in the bank.
Do you follow me?

A. That's right.

Q. That \$100 has been included in the \$233,000 figure at the top, has it not?

A. That is right.

* The deposit slips did not itemize the individual checks but merely contained a total of all checks deposited on the particular occasion (113).

Q. Only \$10 of which represented income?

A. That is right.

Q. So, in that particular instance, and any time that happened, that figure on top, the gross deposits, is distorted as to the amount of change given by Dr. Boulet?

A. That's right.

Q. If Dr. Boulet had just once each week had given change of only \$200 worth in the whole week, just for \$200, do you think you could quickly figure out to me how much additional money would be put into that account or counted by you as unreported income, as gross deposits? Could you do that?

A. \$200 a week?

Q. Yes.

A. That would be \$10,400. In other words, \$200 a week, and 52 week is \$10,400.

Q. So to just that extent if there is \$10,000 in there of funds that is not current income, in fact, that alone, that item alone would account for 1/3 of the bottom line that you have here of \$32,000, wouldn't it?

A. That's right.

Q. And you have no way of knowing at this time definitively what amount of the \$233,000 represented change, do you, given by Dr. Boulet?

A. No, I don't, but we did not obtain any evidence during the investigation, nor was there any statement made by anyone that there was payroll check cashing.

Q. Did you hear Mrs. Williams testify?

A. Yes, I heard what she said.

Q. And she testified it was frequent that they received payroll checks?

A. Yes.

Q. And Social Security and Welfare checks?

A. That's right.

Q. And there was a way of checking her out, was there not?

A. Yes, I guess there is.

Q. There is and there was, am I correct?

A. Well, the only way I could see checking it out would be to determine from her or from the doctor just what those amounts were.

Q. You can't think of any other way?

A. You can't get it from the receipts of the bank, if that is what you are thinking.

Q. But the banks microfilm every single check, front and

back, of every deposit made by Dr. Boulet, am I correct?

A. Yes.

Q. So that had you gone and it would take half an hour for a given day to get those checks, to see the checks on film scanner?

A. Yes. (320-22).

A thorough reading of Martin's testimony pertaining to his analysis of the deposits going into the two business accounts reveals the flaw, in his method of "purifying." *Only the deposit slips were examined*, and the underlying checks deposited were ignored (200-06, 229-30).

Q. Now, did you also perform an analysis of the Race-land Bank and Trust Company business account?

A. Yes, I prepared an analysis of that.

* * * *

Q. I refer to you Government Exhibits 45-A,B,C, and D, and would you explain what you did in your analysis?

A. I took the deposit tickets, or had someone under my control take the deposit tickets, and what we say or we call "spread," the deposits, and I set up columns for the dates, the amounts, and the various breakdowns of cash-currency, cash-checks, and cash withheld on deposit tickets.

Q. Each category that was on any deposit ticket, each different line that was separate, you made a separate category out of that, is that correct?

A. Yes.

Q. You did that in respect to each deposit ticket for each year, '69 through '72?

A. Yes, I did.

Q. How many categories did you end up with?

A. I had those categories as just stated, and in addition to that there was another category I established as I went through the deposit tickets, and from the explanations of the doctor of the items of large cash deposits that were being made, identified this from savings.

Q. Would you explain exactly how you analyzed the deposits?

A. I took the deposit tickets, and as it showed the amount, the gross amount -- I'm sorry, the net amount of deposits; if there was cash shown on the deposit ticket, I indicated cash. If there was a check, I indicated a check.

If there was cash withheld from the deposit, I also indicated that, which would be negative, a subtraction. (200-02).

Because of its very nature, Martin's broad-brush analysis

did not include an actual examination of even a random sampling of the checks which the appellant deposited. In fact, Martin conceded that because of this omission to purify, if payroll checks were negotiated, and if the daily cash receipts were properly reported to Dr. Boulet's tax preparer, then there would have been a *double entry* which resulted in an inflated net taxable income to Dr. Boulet. (320). Of course, the inflating of net income through the failure to purify an analysis built on circumstantial evidence is the precise error about which the *Holland* Court warned district judges who were faced with tax evasion prosecutions based on the *net worth* method of proof. From the startling facts set forth above, there should be little doubt that the time is ripe for a similar review to be made of prosecutions based on the Bank Deposit method of income reconstruction, as well.

As with its erroneous handling of the opening cash on hand issue, the Court of Appeals again weaved a lengthy but flawed argument which this time concluded that an adequate investigation had taken place, even though the undisputed facts demonstrated quite the opposite. The Court of Appeals' central contention was that since "the suggestion that non-income funds were used to cash checks that were later deposited was made for the first time at trial," the Government had no pre-trial obligation to analyze the deposited items to verify their taxable nature *vel non*. 577 F.2d at 1171.

By necessity, the Court of Appeals had to attempt to distinguish the leading case of *United States v. Slutsky, supra*. There, despite the enormity of \$18,000,000 of total deposits during the indictment years, the Government examined every single check deposited in amounts over \$1,000, as the means

of discovering any non-income items that had to be subtracted from gross receipts, and conducted a random survey of over 1,400 checks in amounts under \$1,000 which had been deposited. The *Boulet* panel weakly contended that here the taxpayer never mentioned before trial that his bank accounts might contain non-income items, but that the defendant in *Slutsky* had so alerted the case agents. Whereas the Fifth Circuit cited no authority for the novel and rather dangerous proposition that the Government need not examine the items deposited unless tipped off by the taxpayer that non-income deposits were made, the mandate of *United States v. Morse*, *supra*, based on several earlier cases is quite to the contrary. Before the Government "can legitimately avail itself" of this circumstantial method of proof, it must "initially introduce evidence" to show that "an adequate and full investigation of those accounts was conducted in order to distinguish between income and non-income deposits." *United States v. Morse*, *supra* at 152 (emphasis supplied). It is undisputed that this was not done here; and it is simply inconceivable that the Government could be permitted to deprive a citizen of his freedom on such a scanty showing. If the Government is allowed to utilize the amount of money which a citizen deposits in his bank as the means of demonstrating the under-reporting of income, it should be the fundamental tenet of such a criminal case that the Government must initially review the actual deposits in question.

In sum, there have been a large number of tax evasion prosecutions brought by the United States Department of Justice in recent years which feature proof of underreporting based on a wholly circumstantial method of income reconstruction. Despite the extremely high conviction rate in such

tax evasion cases, and the inherent dangers in permitting the Government to rely on an indirect method of proof, this Court has never reviewed or commented upon the validity of Bank Deposit prosecutions. In the instant case, despite the supposed safeguards set up by various Court of Appeals which have hitherto faced the problem of Bank Deposit prosecutions, the trial court ignored the applicable caselaw, and denied petitioner's Motion For a Judgment of Acquittal, even though the Government's own proof made a mockery of the meager existing protection. Although required to prove opening cash on hand to a "reasonable certainty," the Government's own witnesses alternatively conceded that they could not arrive at this figure with any degree of accuracy, or else posited the impossible -- that petitioner had a "negative" opening cash on hand. While failing to discuss petitioner's central issue on appeal, the Court of Appeals perpetuated the error below when it stated that the Government had established a guarantee of essential accuracy in the underlying circumstantial proof -- even though the case agents failed completely to examine pre-trial even one of the thousands of deposited items which the Government claimed, when added up, proved substantial underreporting.

Counsel is aware of the enormous burden which has befallen this tribunal because of the thousands of certiorari petitions which swamp the Court each year. Nevertheless, petitioner and perhaps many other citizens prosecuted under the increasingly popular Bank Deposits means of income reconstruction now stand on the brink of losing their liberty because the method of circumstantial proof employed against them carries with it an egregious propensity to convert innocence into guilt. It is respectfully suggested that the inherent dangers contained in reconstructing income through the Bank Deposits method of proof have come to fruition

here, and therefore make this type of case particularly appropriate for scrutiny by the nation's highest court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 1978 three copies of this petition were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

Michael S. Fawer

ATTORNEY FOR PETITIONER

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Robert Meyer BOULET,
Defendant-Appellant.**

No. 76-4442.

**United States Court of Appeals,
Fifth Circuit.**

Aug. 8, 1978.

The United States District Court for the Eastern District of Louisiana, Frederick J. R. Heebe, Chief Judge, convicted defendant of willful evasion of income taxes, and defendant appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that circumstantial evidence was sufficient to sustain conviction based upon analysis of defendant's bank deposits and cash expenditures.

Affirmed.

1. Internal Revenue ⇐ 2451.5

In asking jury to rely on analysis of taxpayer's bank deposits and cash expenditures as basis for deciding that taxpayer willfully underestimated his true income, Government, in prosecution for income tax evasion, necessarily relies on circumstantial evidence. 26 U.S.C.A. (I.R.C.1954) § 7201.

2. Internal Revenue ⇐ 2437

Because income tax system is on an annual basis, failure to report income must be charged for a specific year. 26 U.S.C.A. (I.R.C.1954) § 7201.

3. Internal Revenue — 2447

In prosecution for income tax evasion in which Government relies upon analysis of taxpayer's bank deposits as cash expenditures, government must, as part of its duties in negating possibility that bank deposits or cash expenditures in year under investigation originated from nontaxable sources, establish in some fashion amount of cash taxpayer had on hand at start of period. 26 U.S.C.A. (I.R.C.1954) § 7201.

4. Internal Revenue — 2447

Government must prove full and adequate investigation in bank-deposits case just as it must in net-worth case. 26 U.S.C.A. (I.R.C.1954) § 7201.

5. Internal Revenue — 2447

In prosecution for income tax evasion in which Government relied upon analysis of taxpayer's bank deposits and cash expenditures, in view of fact that government did not and perhaps could not analyze each deposit separately to prove that it was from a taxable source, it was government's dual burden to establish with reasonable certainty cash on hand at the beginning of each of the years in question and to negate all other sources of nontaxable income during each of those years. 26 U.S.C.A. (I.R.C.1954) § 7201.

6. Internal Revenue — 2448

In prosecution for income tax evasion in which government relies upon analysis of taxpayer's bank deposits and cash expenditures, government may negate source of nontaxable income during years in question by proof of an adequate investigation that did not disclose nontaxable sources. 26 U.S.C.A. (I.R.C.1954) § 7201.

7. Internal Revenue — 2447

In prosecution for income tax evasion in which government relies upon analysis of taxpayer's bank deposits and cash expenditures, while government must prove its case beyond reasonable doubt with respect to both nontaxable sources and cash on hand, once government has established its case, defendant remains quiet at his peril. 26 U.S.C.A. (I.R.C.1954) § 7201.

8. Internal Revenue — 2448

In prosecution for income tax evasion in which Government relies upon analysis of taxpayer's bank deposits and cash expenditures, Government has duty to investigate leads furnished by taxpayer with respect to cash on hand that are susceptible of being checked, but proof of amount of cash on hand, if any exists, depends upon analysis of accumulated assets and liabilities and not merely upon satisfactory pursuance of those leads, if any, offered by the defendant. 26 U.S.C.A. (I.R.C.1954) § 7201.

9. Internal Revenue ⇐2408

For purpose of prosecution for income tax evasion, if taxpayer's deposits or expenditures during any taxable year come from safety deposit box or secret cache, they are not "income" when taken from their storage place and deposited into a checking account or when spent. 26 U.S.C.A. (I.R.C.1954) § 7201.

See publication Words and Phrases for other judicial constructions and definitions.

10. Internal Revenue ⇐2451.5

In prosecution for income tax evasion in which government relied upon analysis of taxpayer's bank deposits and cash expenditures, prosecution was not required to prove opening cash figure with mathematical exactitude. 26 U.S.C.A. (I.R.C.1954) § 7201.

11. Internal Revenue ⇐2458.1

There exists distinction between proof of cash on hand sufficient to be submitted to jury in prosecution for income tax evasion and proof enough to convict; as a matter of law, court must be satisfied in circumstantial evidence type case that opening cash balance is established with reasonable certainty, and, if this is done, then further question remains whether guilt has been proved beyond reasonable doubt.

12. Internal Revenue ⇐2451.5

In prosecution for income tax evasion in which Government relied upon analysis of taxpayer's bank deposits and cash expenditures, Government adequately established accurate cash on hand figure for beginning of taxable years in question. 26 U.S.C.A. (I.R.C.1954) § 7201.

13. Internal Revenue ⇐2447

In prosecution for income tax evasion in which government relies upon analysis of taxpayer's bank deposits and cash expenditures, government is not required to negate any possible nonincome source of each deposit, particularly where source of funds is uniquely within knowledge of taxpayer and it checks those explanations given by him that are reasonably susceptible of investigation. 26 U.S.C.A. (I.R.C.1954) § 7201.

14. Internal Revenue ⇐2451.5

In prosecution for income tax evasion in which Government relied upon analysis of taxpayer's bank deposits and cash expenditures, Government satisfied its obligation to explore leads thoroughly with respect to taxpayer's bank deposits and to make adequate investigation of all facts reasonably ascertainable. 26 U.S.C.A. (I.R.C.1954) § 7201.

15. Internal Revenue — 2451.9

Even if taxpayer had \$145,000 in unreported income from 1962 through 1968, net worth analysis for this period did not undermine government's case in prosecution for income tax evasion or demonstrate that cash on hand at beginning of 1969 was more than \$15,000 attributed to taxpayer by Government. 26 U.S.C.A. (I.R.C.1954) § 7201.

Michael S. Fawer, Matthew H. Greenbaum, New Orleans, La., for defendant-appellant.

John P. Volz, U. S. Atty., Mary Williams Cazalas, Duro J. Duplechin, Jr., John H. Musser, IV, Asst. U. S. Attys., New Orleans, La., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, GOLDBERG and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The conviction in this criminal prosecution for willful evasion of income taxes¹ was based entirely on the government's evidence that it had reconstructed the medical doctor-taxpayer's income during the years

1. In violation of 26 U.S.C. § 7201.

in question by means of the bank deposits or cash expenditures method. Because the prosecution established the amount of cash on hand at the start of the period with reasonable certainty and performed the duties incumbent on it in attempting to separate taxable income from other sources in the doctor's gross bank deposits and cash expenditures, the question of guilt or innocence was correctly submitted to the jury by the trial court. Therefore, the judgment of conviction is affirmed.²

I.

The defendant, a general practitioner of medicine, whose office was in LaRose, Louisiana, was charged with willful evasion of income taxes for the years 1969, 1970, 1971 and 1972. Dr. Boulet was on a calendar year basis. To prove its charges, the government relied upon one of the two traditional indirect methods of proof, analysis of the taxpayer's bank deposits and cash expenditures. Under this method, all de-

2. Appellant was sentenced to one year imprisonment on each of the four counts, to be served concurrently. Only the first 90 days were to be spent in incarceration; the remainder of the sentence was suspended and appellant was placed on inactive probation for two years to commence on his release from custody. As a condition of probation, Boulet was to make restitution in the amount of \$14,372.45 on Count 1 (1969); \$26,288.50 on Count 2 (1970); \$14,079.51 on Count 3 (1971); and \$4444.75 on Count 4 (1972).

posits to the taxpayer's bank and similar accounts in a single year are added together to determine the gross deposits. An effort is made to identify amounts deposited that are non-taxable, such as gifts, transfers of money between accounts, repayment of loans and cash that the taxpayer had in his possession prior to that year that was deposited in a bank during that year. This process is called "purification." It results in a figure called net taxable bank deposits.

The government agent then adds the amount of expenditures made in cash, for example, in this case, cash the doctor received from fees, did not deposit, but gave to his wife to buy groceries. The total of this amount and net taxable bank deposits is deemed to equal gross income. This is in turn reduced by the applicable deductions and exemptions. The figure arrived at is considered to be "corrected taxable income." It is then compared with the taxable income reported by the taxpayer on his return.³

3. The method must be distinguished from the other circumstantial method usually called net-worth analysis. That method depends upon establishing the taxpayer's net worth at the start of the taxable year by listing all assets, including cash on hand, and all liabilities. The balance is the taxpayer's net worth. A similar analysis is made for the first day of the next taxable year. To any change in the net worth, the investigator adds non-deductible expenditures for living expenses, then deducts receipts from sources that are not taxable income and the amounts represented by applicable tax deductions and exemptions. If the increase in net worth, thus adjusted, exceeds the reported taxable income, the conclusion is drawn that there must have been unreported income. Differ-

[1] In asking the jury to rely on this analysis, as a basis for deciding that the taxpayer willfully underestimated his true income, the government necessarily relies on circumstantial evidence. *United States v. Marshall*, 5 Cir. 1977, 557 F.2d 527, 530, note 3; *United States v. Slutsky*, 2 Cir. 1973, 487 F.2d 832, 839, cert. denied, 1974, 416 U.S. 937, 94 S.Ct. 1987, 40 L.Ed.2d 287; *United States v. Penosi*, 5 Cir. 1971, 452 F.2d 217, 219-220, cert. denied, 1972, 406 U.S. 1065, 92 S.Ct. 1495, 31 L.Ed.2d 795; *United States v. Doyle*, 7 Cir. 1956, 234 F.2d 788, 793, cert. denied, 1956, 352 U.S. 883, 77 S.Ct. 132, 1 L.Ed.2d 87.

[2] It is part of the government's burden of proof to establish beyond a reasonable doubt that the expenditures and deposits come from taxable income for the very year in question. Because our income tax system is on an annual basis, failure to report income must be charged for a specific year. The statute of limitations applica-

ences between the two methods are more fully explained in a number of cases and in many topical writings. See in particular, *Dale, Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 78 Yale L.J. 1, 11-15 (1968).

ble to prosecutions penalizes only failure to report income for specific years. Moreover, the indictment charges an offense for a specific year, and the proof must conform to the indictment.

[3] There is always the possibility that the taxpayer deposited cash that he received from a non-taxable source or from income taxed in a prior year but kept on hand as cash or even from unreported income from a prior year kept on hand in cash. Such events are common human occurrences, and this possibility may of itself create reasonable doubt. Therefore, the government must establish in some fashion the amount of cash the taxpayer had on hand at the start of the period. This is part of the government's duty to negate the possibility that bank deposits or cash expenditures in the year under investigation originated from non-taxable sources. *United States v. Penosi*, *supra*, 452 F.2d at 219-220. See *United States v. Bianco*, 2 Cir. 1976, 534 F.2d 501, 507, *cert. denied*, 1976, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84, suggesting that, in a cash expenditure case, proof of a likely taxable source does not suffice to relieve the prosecution of its duty to negate probable sources of non-taxable income. Compare *United States v. Massei*, 1958, 355 U.S. 595, 78 S.Ct. 495, 2 L.Ed.2d 517 (net-worth method).

[4] We, therefore, review the record "bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Holland v. United States*, 1954, 348 U.S. 121, 129, 75 S.Ct. 127, 132, 99 L.Ed. 150. The government must prove a full and adequate investigation in a bank-deposits case just as it must in a net-worth case. *Holland v. United States*, *supra*. "Such investigation must establish a guarantee of essential accuracy in the circumstantial proof at trial as an element of the government's burden of proving guilt beyond a reasonable doubt." *United States v. Slutsky*, *supra*, 487 F.2d at 840.

II.

It is contended that, in investigating Dr. Boulet, the government failed in two particulars: (a) it did not establish with reasonable certainty the amount of cash that he had in his personal possession, as currency, at the start of each year; these funds were substantial and, when later deposited in a bank account, were erroneously considered income; (b) among his deposits were other items that were not income, such as checks he cashed for patients; failure to delete and exclude these distorted his apparent income. The case does not present the typical problem of an unknown source of income: Dr. Boulet collected his fees in cash. The source of unreported income is contended to be fees paid Dr. Boulet in cash and not reported as income that were detected because they eventually found their way into his bank account.

[5, 6] Because the government did not, and, perhaps, could not, analyze each deposit separately to prove that it was from a taxable source, it is the government's dual burden to establish with reasonable certainty the cash on hand at the beginning of each of the years in question and to negate all other sources of non-taxable income during each of those years. *United States v. Marshall, supra*. The latter requirement may be satisfied by proof of an adequate investigation that did not disclose non-taxable sources. *United States v. Penosi, supra*, 452 F.2d at 219; *See also United States v. Mackey*, 7 Cir. 1965, 345 F.2d 490, 506, cert. denied, 1965, 382 U.S. 834, 86 S.Ct. 54, 15 L.Ed.2d 69.

[7] With respect to both non-taxable sources and cash on hand, the government must prove its case beyond reasonable doubt. However, "once the Government has established its case [in this fashion], the defendant remains quiet at his peril." *United States v. Holland, supra*, 348 U.S. at 138-139, 75 S.Ct. at 137.

[8] Having established that it conducted a thorough investigation, "the government is not required to negate all possible non-income sources of the deposits, particularly where the source of the income is uniquely within the knowledge of the taxpayer. At the same time, however, the government may not 'disregard explanations of the defendant reasonably susceptible of being checked.'" *United States v. Slutsky, supra*,

487 F.2d at 841, quoting from *United States v. Holland, supra*, 348 U.S. at 138, 75 S.Ct. at 137. Hence, the government also has a duty to investigate leads furnished by the taxpayer with respect to cash on hand that are susceptible of being checked. *United States v. Slutsky, supra*, 487 F.2d 843-844. But proof of the amount of cash on hand, if any exists, depends upon an analysis of accumulated assets and liabilities and not merely upon satisfactory pursuance of those leads, if any, offered by the defendant. *See United States v. Marshall, supra*, 557 F.2d at 529; *United States v. Slutsky, supra*, 487 F.2d at 842-843. We consider separately whether the government has satisfied its burden with respect to cash on hand and separation of funds that came from non-taxable sources.

A. Opening Cash on Hand

[9] As in a net-worth case, *Holland v. United States, supra*, 348 U.S. at 132-135, 75 S.Ct. at 134-135, it is essential for the government to establish an accurate cash on hand figure for the beginning of each taxable year. *See United States v. Marshall, supra*, 557 F.2d at 530. If the taxpayer's deposits or expenditures during any taxable year came from a safety deposit box or a secret cache, "they are not 'income' when taken from their storage place and deposited in a checking account" or when spent. *United States v. Frank*, 3 Cir. 1967, 245 F.2d 284, 287, cert. denied, 1967, 355 U.S. 819, 78 S.Ct. 25, 2 L.Ed.2d 35.

Here, the government initially had no cash on hand figure for the start of 1969. Dr. Boulet had informed the agents, and they confirmed with the bank, that he periodically converted currency of small denominations into \$100 bills, which he did not immediately deposit. Dr. Boulet himself said he had kept currency in a safe in his mother's home, across the street from his office, until he accumulated \$3000 to \$4000. He would then convert the money into \$100 bills, and keep them in a safety deposit box in the bank, a block from his office. He had no record of the amount of cash he had on hand on January 1, 1969. The government attempted to establish how much cash Dr. Boulet had on January 1, 1969, by taking as a starting point the year the taxpayer began medical practice, 1962. The taxpayer had made the statement that he had "at most \$5000 in cash then." The agents then proceeded to analyze the sources of Dr. Boulet's funds and the uses to which he applied them during the 1962-1968 period, in an effort to establish the amount of cash he had on hand at the end of the calendar year 1968. See *United States v. Marshall, supra*. Its analysis reflected an anomalous negative cash on hand figure on December 31, 1968; if the taxpayer had the assets he owned, and no greater liabilities than he owed, he must have had

over \$14,000 in cash on hand not reflected either in bank accounts or other places that the investigation had revealed. Moreover, the investigation showed that, on January 2, 1969, Dr. Boulet purchased a bank cashier's check for \$15,000 with cash from a source that could not be identified. The investigator therefore concluded that Dr. Boulet had \$15,000 in cash on hand (in a bank safety deposit box or some other secret place) on January 1, 1969.

Dr. Boulet does not dispute the logic of the government's analysis, but its accuracy; he attempted to impeach this on the basis that the government failed to discover the source of the \$15,000 and by its apparently inexplicable conclusion that there was "negative" cash on hand. He argues that the investigation simply was not pursued far enough. He had in fact a much larger amount in cash at the time, not reflected in bank accounts or other places that maintain records. It was this cash that was deposited in 1969-1972, and thus the source of the deposits in the taxable years was not income for those years, but, as he argues with apparent candor, unreported income from the period 1962-1968; prosecution for these years is, of course, barred by the statute of limitations.

During the investigation, the taxpayer told the IRS agents he had \$30,000 to \$50,000 in cash on hand on December 31, 1968. Because the IRS study credited him with having \$15,000 on hand, this amounted to a claim that he had \$15,000 to \$35,000 more than the amount credited to him.

The government showed, however, that, from 1966 to 1968, Dr. Boulet consistently deposited cash into a special bank account from which he eventually withdrew funds to build a house. Dr. Boulet had told the agents that he made frequent purchases of savings bonds, certificates of deposit and cashier's checks, and they verified this. In later years he also accumulated savings in a homestead association account that would bear interest, and he purchased interest-bearing bank certificates of deposit from time to time. In 1969 he built a home, and paid for it without executing a mortgage. Although he had said the home cost him about \$80,000, he disbursed about \$150,000 mostly from the special bank account, but also including \$40,000 that he withdrew from interest-bearing accounts.

This evidence cumulatively tended to show that Dr. Boulet accumulated \$100 bills, and that he also periodically invested the accumulation. It tended further to show he was not likely to have maintained a non-interest bearing cash hoard sufficient to account for the unreported income that he was alleged to have concealed (all represented by bank deposits in excess of reported income): a total in excess of \$124,000,

consisting of \$31,600 in 1969, almost \$53,000 in 1970, over \$32,000 in 1971; and over \$8,700 in 1972. As the trial court found in denying a motion for a judgment of acquittal, "his cash on hand was in a constant state of flux because he methodically put his money to work earning interest;" it was therefore at least a permissible conclusion that, whatever non-interest bearing cash he may have secretly kept, he would have spent this before depleting an income-producing account to build his home in 1969, the first year under investigation.

[10] The prosecution was not required to prove the opening cash figure with mathematical exactitude. The government's proof was reasonably certain; it led to the conclusion that, when Dr. Boulet bought a certificate of deposit for \$15,000 on January 2, 1969, he invested all of his cash on hand. The government investigated all "leads" furnished by the taxpayer. *United States v. Slutsky, supra*, 487 F.2d at 843; *United States v. Ramsdell*, 10 Cir. 1971, 450 F.2d 130, 133; *United States v. Stein*, 7 Cir. 1971, 437 F.2d 775, 778, *cert. denied*, 1971, 403 U.S. 905, 91 S.Ct. 2205, 29 L.Ed.2d 680; *see also, United States v. Marshall, supra*.

[11, 12] There is a distinction between proof of cash on hand sufficient to be submitted to the jury and proof enough to convict. As a matter of law the court must be satisfied in a circumstantial evidence

type case that the opening cash balance is established with reasonable certainty. If this is done, then the further question remains whether guilt has been proved beyond reasonable doubt. The jury was correctly instructed on its duty. It was not obliged to credit the proof. The evidence was, however, sufficient to go to the jury free from the taint of inadequate investigation; it satisfied the standard of reasonable certainty that safeguards the accuracy of the circumstantial proof. *United States v. Newman*, 5 Cir. 1972, 408 F.2d 791, 796; cert. denied, 1973, 411 U.S. 905, 90 S.Ct. 1527, 36 L.Ed.2d 194.

B. Purification of Bank Deposits

Dr. Boulet's receptionist received payments from patients and prepared a list of checks received each day. At the end of the day he and his receptionist would total the cash and checks and enter them on a deposit slip. About noon every day he went to the bank in person and made a deposit. This deposit was the basis used by him to report income.

Sometimes patients presented a check to the receptionist in payment of a bill that was less than the amount of the check; she cashed the check if the cash on hand was sufficient. During the investigation, Dr. Boulet informed the agent that his recep-

tionist kept only about \$30 in cash on hand for this purpose. If the receptionist did not have enough cash from the \$30 "till money" and from cash fees already collected that day, she referred the patient to the bank, which was only a block away. The patient would go there, cash the check, then return and pay the bill in cash. The agent, therefore, treated all deposits of checks not otherwise identified as reflecting medical fees.

At the trial, however, the receptionist testified that patients frequently presented social security or welfare checks for amounts substantially in excess of their bills, and she would give these checks to Dr. Boulet who would cash them. This contention had never before been made known to the agents. Dr. Boulet now argues that the bank deposits reflect a substantial infusion of cash from his hoard, and are not entirely earned income; hence the government failed adequately to "purify" his bank deposits. He points by contrast to the effort made in *United States v. Slutsky*, *supra*, where the government analyzed each check deposited with a face amount in excess of \$1000. In *Slutsky*, however, bank deposits in each of the years under examination exceeded \$5,000,000 and the taxpayer had informed the agents that the deposits included non-income items; the IRS made an income analysis of items under \$1000, but actually examined in detail only the deposited checks in excess of \$1000 each. It treated all currency deposited in some or all of the six bank accounts as income.

Neither Dr. Boulet nor his receptionist gave this kind of information to the agents during the investigation. Moreover, even if the microfilm of every bank deposit had been located and reproduced, and every check made payable to a patient and endorsed by him had been reviewed, there was no way to separate non-income items. If a check had been found in the amount of \$150.00, made payable to a patient and endorsed by him, and it was established that his doctor's bill was \$8.00, and that he received \$142.00 in change, there would be no way to determine whether the receptionist obtained the change from fees already collected that day (together with the till money kept from earlier fees) or obtained some of it from Dr. Boulet. Even if she obtained some funds from Dr. Boulet, because he said he kept some fees on hand in cash, there would be no way to determine whether the cash he then gave was from current and as yet unreported income or from the alleged hoard built up in earlier years.

There were only two possible sources for any change: cash on hand from prior years or fees received from other patients during the current year and not yet deposited. Because cash on hand was established with reasonable certainty, the money paid the patients in exchange for checks could have consisted of undeposited earnings from other patients. Hence, it was a reasonable inference that the deposits consisted of earned income.

[13] As our brethren of the Second Circuit said, in *United States v. Slutsky*, supra, 487 F.2d at 841, "The adequacy of a bank deposits investigation necessarily turns on its own circumstances." The critical question is whether the investigation was sufficient to support the inference that the unexplained excess in deposits was in fact attributable to currently taxable income. The government is not required to negate every possible non-income source of each deposit, particularly where the source of the funds is uniquely within the knowledge of the taxpayer and it checks those explanations given by him that are reasonably susceptible of investigation.

[14] Remembering that the suggestion that non-income funds were used to cash checks that were later deposited was made for the first time at the trial, we conclude that the government satisfied its obligation to explore leads thoroughly, and to make an adequate investigation of all the facts reasonably ascertainable. It may not present a case to the jury with less. It may not fling a handful of circumstantial evidence in front of a jury. It must do whatever is reasonable under the circumstances. But it is not required to conjecture about and either prove or negate every conceivable defense once it has met its own burden, ex-

plored every reasonable avenue and investigated every lead furnished by the taxpayer and his employees.

C. The Net-Worth Schedules

At the trial Dr. Boulet tested the IRS Special Agent's testimony and the government's case by introducing an analysis of his net worth as of the end of 1968. This was based on another method used by the government in reviewing his income for the years 1962-1968: analyzing the source and application of his funds during that period. Comparison of Dr. Boulet's net worth in 1962 with the net worth this indicated at the end of 1968 might lead to the conclusion that Dr. Boulet had \$145,000 in *unreported net income* during the period 1962-1968. However, the 1968 schedule thus prepared did not show \$145,000 on hand at the end of that period in a cash hoard. It showed in cash only the \$15,000 attributed to the taxpayer by the government. The analysis merely established the possibility of \$145,000 in income that was not accounted for in the government's schedules; but, at the end of 1968, this sum was accounted for by increases in items other than cash on hand.

Although this evidence impeaches the thoroughness of the government's investigation of *income* during the years 1962-1968 (years not included in the indictment), it is not inconsistent with the cash on hand figure attributed to appellant as of January 1, 1969. It does not establish a discrepancy

between source figures and application figures, but merely that each might be too low by the same amount. Were this an appeal from a conviction for the years 1962-1968, this evidence might yield a reasonable doubt as to the adequacy of the investigation of *income* in those years; but here, the proof is relevant only to establishing a reasonably certain *cash on hand figure* at the end of that period. The defendant's schedules, although appropriate grist for the jury, are not so probative with respect to the existence of a cash hoard for the indictment years as to require acquittal as a matter of law.

[15] Even if Dr. Boulet had \$145,000 in unreported income from 1962 through 1968, the net worth analysis for this period does not, therefore, undermine the government's case or demonstrate that the cash on hand as of December 31, 1968 was more than \$15,000. The exhibit was offered to the jury in an effort to show the government's failure to prove its case beyond reasonable doubt; it failed to convince them.

For these reasons we conclude that the case was properly submitted to the jury, the taxpayer's motions for a directed verdict were properly denied, and the conviction is therefore AFFIRMED.

Minute Entry
November 18, 1976
Heebe, J.

UNITED STATES OF AMERICA
versus
ROBERT MEYER BOULET

CRIMINAL ACTION
NO. 76-256
SECTION B

This cause came on for hearing on a previous day on the motion of Robert Meyer Boulet for Judgment of Acquittal.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of Robert Meyer Boulet for Judgment of Acquittal, be, and the same is hereby, DENIED.

REASONS

Defendant here seeks a judgment of acquittal based on the argument that there was insufficient evidence from which the jury could have found him guilty beyond a reasonable doubt since the government did not establish beyond a reasonable doubt the amount of cash on hand at the beginning of the period for which the charged violations had occurred.

However, the record contains sufficient evidence upon which a reasonable jury could have concluded reasonably that opening cash on hand had been established beyond a reasonable doubt. The clear testimony of Special Agent Martin is that

his investigation of Dr. Boulet disclosed that on January 2, 1969, an amount of \$15,000 was expended for a cashier's check. There was no evidence as to where this \$15,000 had come from so Agent Martin concluded that it must have come from a cash hoard. This conclusion of \$15,000 in cash on hand on January 1, 1969, was reached despite Agent Martin's conclusion from a Source and Application of Funds analysis that Dr. Boulet's cash on hand on January 1, 1969, had to be zero. That is, in presenting its case on the amount of cash on hand on January 1, 1969, the government apparently relied more on the direct evidence of an expenditure of \$15,000 than on the Source and Application of Funds analysis done by Agent Martin prior to trial. Agent Martin testified that he had found no evidence to indicate the existence of a cash hoard in excess of \$15,000 on January 1, 1969.

The government introduced a massive amount of documentary evidence at trial in order to refute the allegation which defendant had made to Revenue Agent Graykowski and Special Agent Martin that he had \$30,000 to \$50,000 cash on hand on December 31, 1968. This documentary evidence showed defendant's receipt of reported taxable income and nontaxable income from 1962 through 1968 and his total known expenditures (applications) of cash during this period.

This evidence showed that defendant established a bank building account from 1966 until early 1969 into which he poured a great deal of cash (approximately \$160,000) which was used to build his house. The evidence that defendant withdrew \$40,000 from his savings at Hibernia Homestead during this period to deposit into his building account clearly supports the jury finding that defendant depleted whatever cash he may have had on hand during this period since this represents the only time during the entire eleven-year period that cash funds of any magnitude were withdrawn from the Hibernia.

Defendant's admission to the agents that he made daily accumulations of cash in his mother's safe and brought this cash to the bank once he accumulated \$3,000 to \$5,000 together with the bank records and homestead records showing frequent periodic purchases of bonds, certificates of deposit and cashier's checks, clearly supports a jury finding that defendant did not accumulate a large amount of cash on hand, and a finding that defendant's cash on hand was in a constant state of flux because he methodically put his money to work earning interest.

On this state of the record, a reasonable jury could reasonably conclude that opening cash on hand had been established beyond a reasonable doubt. However, defendant seeks to raise a question in the hope of engendering a reasonable doubt where none in fact need exist.

Defendant argues that the jury must have concluded that Dr. Boulet had approximately \$145,000 in unreported income during the period from 1962 through 1968 based on a reconstruction of income done on the witness stand by Special Agent Martin via the "net worth plus expenditures" method, using figures derived from government summary exhibits and conceded by Agents Martin and Rotolo to be "perfectly accurate." Defendant argues that the \$145,000 had to comprise an additional source of funds which should have been included on the Source and Application of Funds introduced by the government and submits that both Agents Martin and Rotolo "agreed that this amount had to be credited to the 'Source' portion of [the government's] Source and Application of Funds analysis." He further argues that unless it could be established that these additional funds had been expended prior to 1969, there must have been in excess

of \$100,000 cash on hand at the beginning of 1969. He submits that neither Special Agent Martin nor Agent Rotolo could demonstrate how or what portion of the alleged \$145,000 had been used. From this, defendant would have us conclude that the jury must have had a reasonable doubt as to whether the alleged unreported income was expended or placed in a cash hoard.

Defendant's argument is clearly mistaken. The easiest way to see his error is to examine the Net Worth plus Expenditures chart offered as defendant's Exhibit 5, a copy of which is appended hereto. This chart computes Dr. Boulet's income for the years 1962 through 1968 using the evidence introduced by the government (which was the only evidence presented in this case). There are only two basic components to Dr. Boulet's income for the period 1962 through 1968 as set forth on the chart: Increase in Net Worth and Personal Expenditures. The chart indicates that the Increase in Net Worth was \$258,921.23 and Personal Expenditures were \$125,122.06. Monies which were expended by Dr. Boulet as Personal Expenditures between December 31, 1961 and December 31, 1968 cannot also be held by Dr. Boulet as cash on hand on January 1, 1969. Thus, any alleged increase in cash on hand could only be due to the Increase in Net Worth. However, the chart clearly indicates on Line 1 that Cash on Hand was \$15,000 on December 31, 1968, whereas Cash on Hand was \$5,000 on December 31, 1961. Only \$10,000 of the \$258,921.23 Increase in Net Worth was due to an increase in Cash on Hand. The rest of the Increase in Net Worth was entirely accounted for by the government's evidence on Dr. Boulet's Assets (Bank Accounts; Office Building; Personal Residence; Notes Receivable - Roy Troclair; Automobiles; Loan Receivable - Ruth B. McCarthy; Furniture and Household; Business Fixed Assets).

The Taxable Income of Dr. Boulet as computed on the chart was \$345,144.32, consisting of the sum of Increase in Net Worth and Personal Expenditures minus the sum of Nontaxable Receipts and Itemized Deductions and Personal Exemptions. Total reported income was \$199,811.04, leaving unreported income of \$145,323.28. The unreported income came either from Increase in Net Worth or from Personal Expenditures, and therefore no more than \$10,000 of the unreported income could have taken the form of Cash on Hand on January 1, 1969.

The Source and Application of Funds schedule introduced by the government was based on the same evidence on which defendant based his Net Worth plus Expenditure chart, except that defendant's chart included more expenditures than the government's schedule. The government's witnesses admitted that the Source and Application schedule was incomplete. It was incomplete both in that it did not take account of all expenditures by Dr. Boulet (i.e., it omitted some Applications) and in that it did not take account of unreported income (i.e., it omitted a Source). However, all of the information necessary to do a complete Source and Application of Funds analysis was introduced in evidence by the government. The government did not rely exclusively upon its Source and Application of Funds schedule to establish the defendant's cash on hand on January 1, 1969. For example, as already noted, the testimony of Agent Martin indicated that there was no evidence of cash on hand in excess of \$15,000 on January 1, 1969.

If the approximately \$145,000 in unreported income had been included in a Source and Application of Funds analysis as a source of funds, then an equivalent amount of expenditures would have been included as an application of funds. Both Revenue Agent Rotolo and Special Agent Martin gave testimony

to this effect. Partial transcript of the testimony of Revenue Agent Joseph Rotolo, pages 23-24; partial transcript of the testimony of Special Agent Martin, page 8. That testimony is correct since the computation of the unreported income figure was based on evidence as to Applications of Funds by Dr. Boulet; namely, Bank Account, Office Building, Personal Residence, Notes Receivable - Roy Trosclair, Automobiles, Loan Receivable - Ruth B. McCarthy, Furniture and Household, Business Fixed Assets, and Personal Expenditures.

While the Source and Application of Funds schedule presented by the government did not include all applications of funds as to which direct evidence had been introduced, it would have been possible, albeit somewhat difficult, tedious, and time-consuming, for Agent Rotolo on the witness stand to list all those applications individually, meticulously dredging up each piece of evidence bit by bit from the wealth of documentary information which the government had introduced. This is the correct interpretation of the testimony of Agent Rotolo which, taken out of context, was cited in defendant's Memorandum in Support of Motion for Judgment of Acquittal at pages 5-6. This testimony does not by any means "completely erode the entire foundation of the Government's proof of cash on hand . . ." as defendant argues at page 5 of his memorandum. Nor does the testimony amount to an admission that Agent Rotolo could not "demonstrate how or what portion of [the \$145,000 in unreported income] had been used" as defendant argues on page 5 of his memorandum.

In pertinent part, the testimony reads as follows:

"Q. My point is everything from the net worth statement that we introduced was in evidence, was it not?

"A. Yes, and these expenditures are in evidence, too.

"Q. Will you please then, can you calculate the expenditures so we can get a correct figure and we can go forward into the period with the right cash on hand?

"A. It would take me a while to do it. I can't sit up here and do it, right from the top of my head.

"Q. Right now, is it fair to say, as you sit there, you cannot determine with any degree of accuracy, right there as you sit on this witness stand, you cannot determine with any degree of accuracy how much cash on hand Dr. Boulet went into 1969 with?

"A. I cannot do it, no. You are asking me, no, I cannot, but we both know there is additional expenditures that should be on this thing.

"Q. I agree, but the question is, what is left?

"A. I don't know. I don't have the information here right now."

(Partial transcript of the testimony of Summary Witness, Revenue Agent Joseph Rotolo, at pages 23-24.)

In this testimony, Agent Rotolo clearly indicates that the evidence on applications (expenditures) is in the record but that he cannot fill out the application section of defendant's source and application schedule "right from the top of [his] head." Defense counsel's next question asks Agent Rotolo whether he can provide a cash on hand figure derived from the source and application analysis "... right there as you sit on this witness stand" Not surprisingly, in light of Agent Rotolo's prior answer, he testified, "I cannot do it, no," and "I don't know. I don't have the information here right now."

The other portion of Agent Rotolo's testimony quoted by defendant is merely an erroneous accession by Agent Rotolo to an assertion by defense counsel. It reads:

"Q. So we have no way, as the result, because we haven't gotten an accurate source and application -- or we haven't gotten an accurate application, I should say, to determine the cash on hand, is that correct? And that is where we sit?

"A. Right."

(Partial transcript of the testimony of Summary Witness, Revenue Agent Joseph Rotolo, at page 25.)

While it was true that the government's Source and Application of Funds schedule included neither unreported income nor all applications, it was not true that there was "no way . . . to determine cash on hand" All of the necessary evidence was before the jury. The jury was instructed that it was their duty to weigh the evidence and to give expert opinions such weight as the jury thought were deserved. The jury was not bound to accept everything that Agent Rotolo said on the witness stand but was expressly instructed that "if you should conclude that the reasons given in support of the [expert's] opinion are not sound, you may reject the opinion entirely or give it such weight as you think it deserves."

The government also introduced in this case testimony by Special Agent Martin (who had prepared the government's Source and Application of Funds schedule), which in pertinent part reads:

"Q. And if you threw the one hundred twenty [of unreported income] up at the top of your [Source and Application] chart, and you took off the negative [balance at the bottom of the chart], you still have a positive, a substantial positive figure, and you are just saying it was spent. And I am asking you, show me where on your [Source and Application] chart?

"A. The expenditures for both items are not included on that chart.

"Q. Thank you.

"A. But they were expended, the funds were expended; they were not on hand."

(Partial transcript of the testimony of Special Agent Martin, page 8.)

Given the fact that Special Agent Martin had prepared the Source and Application of Funds schedule whereas Agent Rotolo was a summary witness, the jury might reasonably have given greater weight to Special Agent Martin's testimony.

In any event, despite the presence of some errors in expert testimony, it is quite clear that there was sufficient evidence upon which the jury could reasonably have found cash on hand established beyond a reasonable doubt.

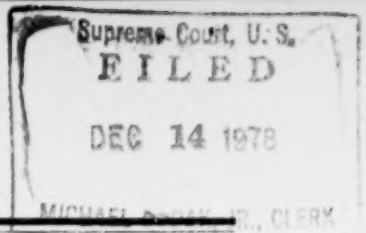
Frederick H. H. H.

Attachment

Computation of Taxable Income
for the years 1962 - 1968 inclusive

Assets	12/31/62	12-31-68
Cash on hand	5,000.	15,000.00
Bank Accounts:		
Raceland Bldg: 11-03222001	-0-	25,625.00
Raceland Bus: 11-03222004	-0-	5,761.13
S. Lafourche Bus: 02-00206032	-0-	1,073.81
Raceland Personal: 11-03222020	-0-	2,446.00
Raceland Savings: 02-03622126	-0-	250.12
Hibernia Homestead	-0-	60,705.50
Citizens Bank	5,797	-0-
Office Building	-0-	2,770.14
Personal Residence	2,800 -	12,812.79
Notes Receivable - Roy Trosclair	-0-	9,713.14
Automobiles	25,000.	75,000.00
Loan Receivable - Ralph B. McCarthy	-0-	8,500.00
Furniture & Household	-0-	7,056.20
Business fixed assets	-0-	4,706.60
Total Assets	17,797	273,765.09
Liabilities & Depreciation Reserve		
Depreciation Reserve	-0-	12,168.12
Total Liabilities and Depreciation Reserve	-0-	12,168
Net Worth	17,797	276,100.77
less: Beginning net worth		17,797.00
Increase in Net Worth		258,303.77
Plus: Personal Expenditures		125,123.66
Less: Non taxable receipts		1,456.00
Itemized Deductions		12,542.70
Personal Exemptions		25,200.00
Taxable Income		205,184.31
<i>Unreported Tax Income</i>	<i>11,700, 15,000</i>	<i>14,052.32</i>

No. 78-498



In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT MEYER BOULET, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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*ON PETITION FOR A WRIT OF CERTIORARI TO
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**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner seeks review of his conviction for income tax evasion on the ground that the government failed to establish with reasonable certainty the amount of cash on hand at the outset of the prosecution years and failed to investigate adequately and eliminate all non-income deposits to his bank accounts. Petitioner's purely fact bound claims lack merit and do not in any event warrant consideration by this Court.

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on four counts of income tax evasion for 1969-1972, in violation of 26 U.S.C. 7201 (Pet. App. A-6 to A-7). The district court sentenced him to concurrent one-year terms on each count, with all but 90 days of the sentence suspended, and placed him on inactive probation for two years following his release from custody. As a condition

of probation, the court ordered petitioner to pay taxes and penalties due in the total amount of \$59,185.21 (Pet. App. A-7 n.2). The court of appeals affirmed (Pet. App. A-1 to A-23).

1. Petitioner contends (Pet. 16-24) that his prosecution under the bank deposits method of proof was defective because the government failed to establish with reasonable certainty the amount of cash he had on hand at the beginning of the prosecution years.¹ As a part of its case, the government introduced evidence that petitioner had \$15,000 cash on hand as of January 1, 1969, the beginning of the prosecution period. The evidence established that petitioner purchased a \$15,000 cashier's check with cash on January 2, 1969, and that the agents could not find any disbursements out of business or personal accounts that explained the source of the \$15,000 (App. 277-279).² Accordingly, the agents credited petitioner with \$15,000 cash on hand as of January 1, 1969, the beginning of the prosecution period (App. 277-278). The evidence also established that beginning in 1962, petitioner, a physician, deposited daily cash receipts from patients in his mother's safe. After he had accumulated three to four thousand dollars in this manner, he would convert it into \$100 bills and place the bills in a safe deposit box. Subsequently he used these funds either to purchase cashier's checks and deposit them in a savings

¹Under the bank deposits method of proving the receipt of taxable income, the government must introduce evidence to show that, during the years in question, the taxpayer was engaged in income-producing activities, that he made regular deposits of funds into bank accounts, and that it conducted a full investigation of those accounts in order to distinguish between income and non-income deposits. The permissible inference is that the total bank deposits minus the non-income deposits and the amounts on deposit prior to the tax years in question represents taxable income. *United States v. Morse*, 491 F. 2d 149, 152 (1st Cir. 1974).

²"App." refers to the joint appendix filed in the court of appeals.

account or for personal expenditures (App. 114-116, 152-153). Beginning in 1962, petitioner frequently purchased savings bonds and certificates of deposit (Pet. App. A-16). He periodically transferred large balances in his childrens' savings accounts to accounts paying higher interest rates and used the interest from those accounts to purchase certificates of deposit (App. 173). In 1966, petitioner opened a savings account into which he deposited funds for the purpose of constructing a home and deposited approximately \$160,000 in this account, including about \$49,000 from other interest bearing accounts (App. 189-190, 192, 194-196).

The determination of the amount of opening cash on hand is a question of fact for the jury. See *United States v. Fisher*, 518 F. 2d 836, 841 (2d Cir.), cert. denied, 423 U.S. 1033 (1975). The court of appeals therefore correctly recognized (Pet. App. A-16 to A-17) that from the evidence presented, the jury could reasonably have concluded that petitioner methodically put his money to work earning interest and was not likely to have had cash on hand as of January 1, 1969, in a non-interest bearing account in an amount greater than the \$15,000 established by the evidence. Indeed, the evidence convincingly refutes any notion that petitioner had sufficient cash to account for the unreported income that he was alleged to have concealed—an amount in excess of \$124,000 for 1969-1972.

Petitioner argues (Pet. 8-9, 20-23) that the agent's computation of his net worth for the years 1962-1968 established that he had unreported income of more than \$145,000 during those years, so that the cash-on-hand figure as of the beginning of 1969 should have been in excess of \$100,000. But in computing petitioner's net worth, the agent clearly established that the major portion of the \$145,000 had been used by petitioner to acquire various other assets (App. 358-379). As the agent

explained on redirect examination (App. 453-457), only \$15,000 of the approximately \$145,000 of unreported income represented cash on hand, with the remainder of that amount having been expended for the acquisition of other assets.

Petitioner also contends (Pet. 10-12, 16, 22-23) that the government's summary expert witness conceded that he could not determine the cash on hand as of January 1, 1969. But the witness did not so concede. When the remark is examined in the context of his entire testimony, it is clear that the witness simply stated that he could not relate, without the assistance of the exhibits which had been admitted in evidence, how petitioner had used the \$145,000 in unreported income for 1962-1968 (see App. 528-531). At all events, as the district court observed in denying petitioner's post-trial motion for judgment of acquittal (see Pet. App. A-24 to A-33), the expert's remark was at worst an erroneous characterization of the state of the evidence. Contrary to petitioner's claim (Pet. 23), the district court correctly concluded that the witness' remark could be disregarded because the evidence established the precise disposition of the \$145,000.

2. Petitioner further argues (Pet. 12-13, 24-32) that the government failed to investigate adequately and eliminate all non-income deposits to his bank accounts. His nurse testified that they often cashed patient's social security checks, welfare checks, payroll checks and the like. From the check would be deducted the amount owed to petitioner for services rendered, and the patient would be given the difference in cash. Petitioner's nurse testified that although some of the cash used to negotiate the checks came from daily receipts, often there was insufficient cash in the daily receipts to cash such checks, and on such occasions petitioner would give the patient the change from his own pocket (App. 13-14, 35-38, 47-49). The agent who conducted the bank deposits analysis

acknowledged on cross-examination that any time petitioner had accepted a third-party check and had given change, the gross deposits figure in his analysis would have been overstated by the amount returned to the patient (App. 319-321). The agent also admitted that he could have examined the microfilmed checks relating to each deposit and thus discovered what portion of each deposit constituted third-party checks (App. 322-323). On these facts, petitioner asserts that the agent's admission that he did not examine the microfilmed checks establishes that the agent's investigation was not adequate to eliminate all non-income items from the bank deposits.

To be sure, in a bank deposits case, the government must establish that it conducted an adequate and full investigation of the bank accounts in an attempt to identify and eliminate all non-income items. *United States v. Morse, supra*. Here, the investigating agent testified concerning the steps he took to discover and eliminate all non-income items (App. 182-183, 188-206, 229-236, 238-241). The agent's failure to examine the microfilmed checks does not establish that his analysis was inadequate. In interviewing petitioner, the agents were told that the overwhelming portion of all deposits to petitioner's bank accounts consisted solely of fees received from patients (App. 88, 149-163). Neither petitioner nor his nurse ever suggested to the agents that a portion of the deposits consisted of third-party checks cashed for patients out of a cash hoard accumulated in prior years (App. 88, 427-428). As the court of appeals recognized (Pet. App. A-21 to A-22), there was no reason for the agent to examine the microfilmed checks relating to the deposits because

they were never told about the third-party checks.³ Indeed, an examination of the microfilmed checks would have been of no avail because the third-party checks themselves would not have revealed whether the entire amount of the check or only a portion thereof had been given to petitioner in payment of a fee (see Pet. App. A-20).⁴ Moreover, even if it could have been determined that only a portion of the check had been given in payment of a fee, the check itself would not have revealed whether the cash given to the patient in change was from current receipts, in which case the entire amount of the check would reflect taxable income, or from a cash hoard accumulated in prior years, in which case only that portion of the check given in payment of a fee would constitute taxable income. Accordingly, the agent's failure to examine the microfilmed checks did not establish that the bank deposits analysis was inadequate. At all events, since the evidence established that petitioner had only \$15,000 cash on hand at the beginning of the prosecution period, which he immediately spent, the jury could reasonably have inferred that any refunds to patients came from current receipts, so that the entire amounts of any third-party checks reflected taxable income (see Pet. App. A-20).

³*United States v. Slutsky*, 487 F. 2d 832 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1974), upon which petitioner relies (Pet. 18), is distinguishable. In *Slutsky*, the agents did examine some of the deposited items. But there the taxpayer had asserted during the course of the investigation that a large amount of the deposits were non-income items (see 487 F. 2d at 836).

⁴Fees paid were recorded on the patients' cards (App. 20). Although petitioner offered to permit the revenue agent to examine the cards (App. 77-78), he refused to permit the Special Agent, who compiled the bank deposits analysis, to examine them (App. 422-424).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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